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Nos. 544, 545

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Supreme Court of the United States

OCTOBER TERM, 1964

ARROW TRANSPORTATION COMPANY, ET AL., *Appellants*,

v.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, ET AL., *Appellees*.

INTERSTATE COMMERCE COMMISSION, *Appellant*,

v.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, ET AL., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

MOTION TO AFFIRM

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Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the Southern Railway System lines, appellees (hereafter collectively referred to as "Southern"), respectfully move that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from a judgment of a three-judge District Court which, upon the suit of these and other appellees, annulled and enjoined an order of the Interstate Commerce Commission entered in *Grain in*

Multiple-Car Shipments — River Crossings to the South (321 I.C.C. 582; J.S. p. 15a *et seq.*).[1] The Commission had held unlawful, and had directed the cancellation of, certain rates published by appellees for the transportation of grain to consuming points in the Southeastern states. It had ruled that the illegality found could be cured only by (1) the publication of rates from one group of cities, found to have been unduly prejudiced, on a basis "no less favorable to shippers located thereat" than the rates available to shippers at another group of cities found to have been unduly preferred, and (2) a simultaneous increase in the entire rate schedule as thus adjusted by a minimum of 16 per cent.

This litigation has a lengthy history. It arose as a result of what both the court below and the Commission itself recognized to be a good faith effort by these appellees to combat the competition of the unregulated long distance "back-haul truckers" which, prior to the effective date of the rates, moved most of the vast and increasing volume of grain flowing from the grain producing Midwest to the grain consuming areas of the Southeastern states. (J.S. pp. 26a-28a, 38a). Because their charges for transporting grain are not subject to Interstate Commerce Commission regulation, and because their primary source of revenue is their original haul, these back-haul truckers were able to compete for this grain traffic on an altogether flexible basis, keeping their charges just low enough to secure the traffic, and without regard to the profitability of these charges since any revenue realized therefrom could at

[1] The citations to "J.S." are to the Jurisdictional Statement of appellants Arrow Transportation Company, et al.

least be offset against the necessary expenses incurred in the trip back home.

Prior to the publication of the rates which are the subject of this case, Southern's rate structure, geared to movements in conventional equipment and covering many elaborate special services, was not such as to constitute effective competition to this back-haul truck traffic. (J.S. p. 80a).[2] Aware that this rate structure was causing it to fall far behind the unregulated long distance back-haul truckers in the competition for the grain movement to the Southeast, Southern's management some years ago embarked upon an ambitious program of research and development designed to enable it to enter into successful competition with the truckers for this traffic. (J.S. pp. 19a-20a). This program, carried on over a period of years, resulted in the production of a new and revolutionary railroad car, characterized by the Commission in this case as a "technological achievement" and "a major breakthrough in the control of cost and a notable advance in the art of railroading." (J.S. p. 20a). The new car, made with an aluminum body and popularly known as the "Big John," has an empty weight little greater

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[2] Among these special services were transit privileges, whereby a grain shipment could be stopped by the shipper anywhere along its route from origin to destination for a commercial purpose, such as storage or processing. Each such transit stop in point of fact constitutes a delivery and reshipment of the grain, in connection with which the carrier incurs heavy terminal expenses. Transit shipments are additionally costly to the carrier because such shipments, involving an intermediate destination, tend to move by a much more circuitous route than would otherwise be the case. Another service customarily offered under the old rates was a relatively lengthy "free time" during which shippers could keep cars at origin, transit point or destination for loading or unloading without extra charge.

than that of the conventional box car, but is able to carry a grain load of over 100 tons in contrast to the approximately 50 tons that can be loaded in the conventional box car. (J.S. p. 20a). The Big John offers other cost-saving features as well—including automatic gravity unloading, separate compartments for loading different types of grain in a single car, freedom from rust, infestation and water damage, avoidance of the need for costly "grain doors," and lower maintenance costs. (J.S. p. 84a). Before the record before the Commission was closed, Southern had acquired 500 of these cars at a cost of thirteen million dollars. (J.S. p. 20a).

Taking advantage of this technological innovation, which put it for the first time in a position to publish rates to meet the long-distance back-haul unregulated truck competition that had become dominant in the transportation of grain to the Southeast, Southern published proposed reduced rates on grain from Cincinnati, Louisville, Evansville, St. Louis and Memphis to 37 destinations throughout the Southeast.[3] In order to achieve the maximum cost savings possible, the rates were made applicable only to shipments made in "Big John" cars (and then only with respect to movements of a minimum of 5 cars carrying at least 450 tons of grain); did not cover transit privileges; permitted only a short "free time" for loading and unloading; and were available only to shipments moving from one origin to one destination on one bill of lading from one consignor to one consignee. (J.S. pp. 17a, 74a).

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[3] The rates were subsequently published from certain Tennessee River points served by Southern, and to a large number of additional destinations, in accordance wi Southern's undertaking to provide, upon request, the same basis of rates to any and all origins and destinations served by it. The other railroad appellees involved in this case published comparable rates but, since they did not possess the Big John cars developed by Southern, made them applicable to movements in conventional cars. (J.S. pp. 44a, 74a).

The rates from and to all points were computed on the basis of a formula providing 42¢ per ton for terminal service plus .573¢ per ton mile and, in addition, a minimum charge of 240¢ per ton was established. (*Ibid.*) Since the purpose of the rates was to combat the altogether flexible and unregulated competition of the long distance back-haul trucker, the rate formula was designed to produce rates that would cover costs plus a reasonable profit for the anticipated hauls averaging about 600 miles.

The 240¢ minimum charge (applicable to hauls up to approximately 350 miles) was established for essentially two reasons: First, on shorter hauls Southern did not face unregulated back-haul truck competition, but rather an altogether different kind of truck competition dependent for its revenues on the grain haul alone. The minimum charge was low enough adequately to meet this competition on the movements that it would govern. Second, the minimum was established in recognition of the fact that hauls under 350 miles are relatively far more costly than long hauls, because of the much higher ratio of high cost terminal service to lower cost road haul service and because of the far lower degree of annual car utilization on short-haul routes. (I.C.C. Tr. 12187-88).

The rates were filed on July 11, 1961. Although they were warmly supported by the United States Department of Agriculture, the governors of the Southeastern states, grain consumers throughout the Southeast, and many shippers, they were protested by some shippers located at Tennessee River ports such as Guntersville, Alabama, and Chattanooga, Tennessee, and by certain barge line and other interests. On August 7, 1961, the Commission suspended the rates and insti-

tuted an investigatory proceeding with respect to them. Lengthy hearings, extending over 139 hearing days and resulting in a record of over 15,000 pages, were thereafter had. When the seven-month suspension period authorized under Section 15(7) of the Interstate Commerce Act expired prior to the conclusion of these hearings, some of the protestants succeeded in obtaining temporary injunctive relief from the courts and thereby prevented the rates from going into effect. This restraint was ultimately lifted when this Court held that the courts lack jurisdiction to extend the Section 15(7) suspension period, *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658, and on May 11, 1963, the reduced rates finally became effective.

In the meantime, on January 21, 1963, Division 2 of the Commission, which has supervisory responsibility over railroad rates, ruled unanimously that Southern's reduced rates were lawful.[4] (318 I.C.C. 641; J.S. p. 71a *et seq.*). On petition for reconsideration, a divided full Commission on July 15, 1963, reversed the decision of Division 2.

The Commission held the rates to be in violation of Section 3(1) of the Interstate Commerce Act on the ground that they unduly prejudiced cities and shippers located on the Tennessee River and unduly preferred cities and shippers located on the Ohio and Mississippi Rivers. The basis for the Commission's conclusion was the fact that because the Tennessee River points are located less than 350 miles from some major

[4] As to the comparable rates published by the railroad appellees not part of the Southern System, which as noted above applied to movements in conventional equipment, Division 2 held that the proposed rates had not been shown to be compensatory. (J.S. p. 110a).

Southeastern grain consuming points, and the Ohio and Mississippi River cities more than 350 miles from those points, shippers from the Tennessee River cities would, by virtue of the 240¢ minimum applicable to hauls of approximately 350 miles or less, pay a higher per mile—although a lower total—rate for the rail transportation of grain to some Southeastern destinations than would shippers located at the Ohio and Mississippi Rivers.[5] The Commission ruled that in order to cure the illegality that it had found, the Southern must revise its rates so that the shippers at the Tennessee River cities would receive a rate "less favorable" than that received by shippers at the Ohio and Mississippi River points. (J.S. p. 44a). Since, as indicated above, the rates from the Tennessee River points to many destinations were already lower in absolute terms than those from the Mississippi and Ohio River points, this necessarily meant that the Southern was required to offer rates to Tennessee River shippers more favorable than those made avail-

[5] Contrary to the impression which appellants have sought to create, rail shipments from the Tennessee River points to grain consuming destinations in the Southeast are by no means all governed by the minimum. Many of these destinations are more than 350 miles from the Tennessee River. For example, whereas 90 of the destinations named in Southern's tariff are less than 350 miles distant from Chattanooga and governed by the minimum, the other 139 destinations are subject to rates that exceed the minimum.

By the same token, the minimum is by no means of merely theoretical application to shipments from the Ohio and Mississippi River cities to consuming points. Thus, for example, 20 grain consuming points named in Southern's tariffs are less than 350 miles from Memphis, 16 are less than 350 from Louisville, 11 less than 350 miles from Cincinnati and 6 less than 350 miles from Evansville. Grain shipments from those cities to these points thus move at the minimum rate.

able to shippers at the Ohio and Mississippi River points or, to state the matter in another way, that Southern could not offer long haul competitive rates without *pro rata* adjustment in its short haul rates.

The Commission then went on to hold that because the rate adjustment required by this portion of its order would substantially decrease the annual utilization of Southern's Big John cars and thereby substantially increase Southern's average per mile costs, and because in the Commission's view car utilization would, even apart from the rate adjustment ordered, be lower than the utilization figure used by the Southern in computing its costs, a restatement of Southern's costs was required. (J.S. pp. 48a-49a). In making this restatement the Commission used an annual utilization figure of approximately 20,800 miles, the average utilization figure for Southern's fleet of conventional covered hopper cars. In so doing it ignored both Southern's actual utilization experience with the Big John cars and the many other factors and circumstances which indicated strongly that Big John car utilization would run far higher than conventional hopper car utilization. On the basis of its restatement of costs by this extraordinary method the Commission determined that upon correction of the Section 3(1) violation that it had previously found, Southern's rates would return approximately 102 per cent of out-of-pocket costs. (J.S. p. 49a).[6]

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[6] The Commission had earlier concluded that because Southern's rates were published to meet unregulated truck competition, out-of-pocket rather than fully distributed cost was the standard properly to be applied in determining whether the rates were so unreasonably low as to be in violation of law.

The Commission then concluded that this return would render the rates unreasonably low in violation of Section 1(5) of the Act, and might well cause them to be unfair and destructive as to certain protestant barge lines in violation of the National Transportation Policy. It thereupon directed that Southern, after readjusting its rates to make them "no less favorable" to the Tennessee River interests, increase them across the board at least 16 per cent, and ruled that other railroad appellees might lawfully publish rates upon the same basis. (J.S. pp. 49a, 45a).

Although the Commission's opinion sought to minimize the significance of its action, the result of that action was to distort out of all recognition Southern's rate proposal. That proposal had been meticulously designed effectively to meet the particular and different competitive circumstances encountered by Southern with respect to long haul movements, on the one hand, and short haul movements, on the other, and to achieve maximum car utilization in order to reduce costs and rate levels as far as possible so that Southern might successfully and profitably compete for both kinds of movements. As ordered modified by the Commission, the rates would be lower than necessary to meet the competition found by Southern with respect to short haul movements and, in Southern's best judgment, no longer sufficiently low effectively to meet the competition found by it with respect to long haul movements.

These appellees and others brought suit before a statutory three-judge district court in Ohio to enjoin and annul the Commission's order. After a full oral hearing and the submission of extensive briefs, that court ruled that the Commission's order was invalid and could not stand.

As to the Commission's Section 3(1) determination, the District Court held that the conclusion constituted an abuse of discretion in light of the fact that those of the Commission's findings that found support in the record affirmatively showed a substantial dissimilarity of transportation conditions among the relevant points, whereas the finding primarily relied on to show a similarity of transportation conditions was without support in, and indeed was contradicted by, the evidence. (J.S. pp. 12a-13a). The Commission's conclusion that the rates were unreasonably low in violation of Section 1(5) was found by the court to be invalid because it was based on the rejected premise that Section 3(1) had been violated, and also because other cumulative grounds relied on by the Commission to support its conclusion that Southern's car utilization would be far lower, and its costs accordingly far higher, than shown by Southern's actual experience, were based on findings without substantial evidentiary support in the record. (J.S. p. 13a). Finally, the court ruled that the Commission's direction that the rates must be increased by 16 per cent in order to avoid "unfair and destructive competition" against the barge lines was inconsistent with Section 15a(3) of the Act, which forbids the Commission to hold rates of a carrier "up to a particular level to protect the traffic of any other mode of transportation," and was also without evidentiary support. (*Ibid.*).

ARGUMENT

The issues presented by these appeals are narrow and conventional. It is elementary that orders of the Interstate Commerce Commission, like those of other administrative agencies, to be valid must rest on clear and complete supporting findings, and that those findings must in turn be supported by substantial evidence. In this case the District Court correctly applied the foregoing rules to hold that the Commission's order requiring specified adjustments in Southern's rates lacks the essential support of adequate findings based on substantial evidence. Contrary to the suggestions of appellants (I.C.C. J.S. p. 12; J.S. pp. 20-21), the court has not affirmatively concluded that Southern's rates are valid or "sought to remove any factual issues permanently from the Commission's jurisdiction." Those rates remain carrier-made rates subject to further Commission action under appropriate conditions and circumstances. Compare *I.C.C.* v. *Inland Waterways Corp.*, 319 U.S. 671, 686. The court has held only that the Commission's decision, declaring the rates to be invalid for particular reasons and in particular respects, cannot stand. That holding, which enunciates no novel rule of law but is rather based on the deficiencies of the Commission's findings and their failure to reflect the evidence of record, raises no issue sufficiently substantial to require or warrant further argument in this Court.

1. The Section 3(1) Issue.

Section 3(1) of the Interstate Commerce Act forbids any common carrier to give any "undue or unreasonable preference or advantage" to particular persons or localities or to subject to "any undue or unreasonable prejudice or disadvantage" any person

or locality. It is settled law that a determination of undue or unreasonable preference or prejudice that violates Section 3(1) must rest on three essential elements: (1) a difference in transportation charges as between persons, areas or traffic; (2) injury resulting from the difference; and (3) substantial similarity of conditions and circumstances as between the persons, points or traffic allegedly unreasonably prejudiced and those allegedly unreasonably preferred. Although the third element is not stated in terms in Section 3(1), this Court has expressly ruled that in this respect Section 3(1) is to be construed *in pari materia* with Section 2 of the statute, which forbids discrimination as between shippers but only when there are "substantially similar circumstances and conditions." See *Baltimore & Ohio R. Co.* v. *United States*, 319 U.S. 1, 13. The Interstate Commerce Commission itself has on many occasions recognized that such is the proper construction of Section 3(1). See, *e.g.*, *Benzol Between Michigan and Ohio*, 200 I.C.C. 209 (1934).

In the instant case the Commission held that a violation of Section 3(1) of the Act existed by reason of the fact that although Southern's rates from all points were equal for equal distances, it had not made rates for short hauls from the Tennessee River points "no less favorable" on a per mile basis than those that it had made for long hauls from the Ohio and Mississippi River points.[7] The Commission thus ruled that any

[7] As indicated above (p. 7 n. 5) the rates also apply to long hauls from the Tennessee River, and to short hauls from the Ohio and Mississippi Rivers. In these instances, it is the latter shipments which are governed by the minimum, and the former that are unaffected thereby.

disparity of per mile rate treatment by Southern as between short and long hauls would be unduly prejudicial and preferential. It was this holding that the District Court held, on the evidence of record and the findings of the Commission itself, to constitute an abuse of discretion.

The court noted that the Commission had made certain findings demonstrating that transportation conditions as between the points of origin allegedly unduly preferred and those allegedly unduly prejudiced were in fact not similar. The most notable of these was the Commission's finding that, if Southern was required to establish rates from the Tennessee River points to the Southeast on the same per mile basis as its rates from its Mississippi and Ohio River points, the result would be drastically to decrease the average annual utilization of Southern's Big John cars. (J.S. p. 42a).[8] This conclusion necessarily recognized that Southern's costs in rendering short-haul rail service from the Tennessee River points to the Southeast would be substantially higher on a per-mile basis than its costs in rendering long haul service from the Mississippi and Ohio River points.

Even if other transportation conditions as between the groups of cities had been correctly found by the Commission to be substantially similar, the court would have been justified, by reason of this affirmative Com-

[8] The decrease in utilization would come about in part by reason of the fact that "turn-around time" would on short hauls such as from the Tennessee River points be approximately as great as that on far longer hauls.

mission finding as to an inequality of cost conditions and the long-standing rule that "any fact which produces an inequality of condition * * * justifies an inequality of charge," *I.C.C.* v. *Baltimore and Ohio R. Co.*, 145 U.S. 263, 284, in striking down the Commission's determination that Section 3(1) required short haul rates from the Tennessee River points "no less favorable" than the long haul rates from the Ohio and Mississippi River points.[9] In the instant case, however, the court properly found that an additional fundamental defect existed in the Commission's decision in that the finding primarily relied on by the Commission to show similarity of transportation conditions was not supported by substantial evidence of record.

The finding in question was as follows:

> "No defense is available to the Southern here by reason of any substantial dissimilarity in transportation conditions as between the origins preferred and those prejudiced. Severe truck competition exists at the Tennessee River ports as well as at the Ohio and Mississippi River crossings. It is well settled that a carrier may not pick and choose the competition it will meet if the effect thereof is to create undue preference and prej-

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[9] A difference in cost has always been recognized as a fundamental difference in transportation conditions, negating any duty to maintain an equality of rates. See, *e.g.*, United States v. Illinois Central R. Co., 263 U.S. 515, 524:

> "* * * the difference in rates cannot be held illegal, unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions * * *."

See also New York v. United States, 331 U.S. 284, 305; Increased Express Charges Within Eastern Territory, 300 I.C.C. 597, 610 (1957).

udice. *Mississippi Cotton Seed Crushers Assn. v. A., B. & C. R. Co.*, 238 I.C.C. 87, affirmed, 251 I.C.C. 643 (1942)." (J.S. p. 43a).

If this finding is interpreted to mean no more than that some kind of truck competition exists at the Tennessee River points as well as the Ohio and Mississippi River points, it provides no support for a conclusion as to substantial similarity of competitive conditions. Such substantial similarity is not established simply by the existence of competition at the various points, but only if any such competition as may exist is of a substantially similar kind. If, on the other hand, the finding was intended to mean that Southern faces substantially the same kind of truck competition at the former points as at the latter, it was invalid because unsupported by substantial evidence in, and, indeed, inconsistent with, the record.

Southern never contended before the Commission that truck competition did not exist at the Tennessee River points. Its position was rather that, unlike the situation at the Mississippi and Ohio, it was faced at the Tennessee River points not with the competition of back-haul truckers in a position to haul grain at rates not in themselves compensatory, but rather only with a far higher cost, empty-return operation performed mainly by truckers whose business was hauling grain or by grain receivers in their own trucks, and that the 240¢ minimum was sufficiently low adequately to meet this latter kind of competition.

The record before the Commission clearly established this dissimilarity between the truck competition at the Tennessee River points and that at the Mississippi and

Ohio River points. There was considerable evidence that grain movements from the Tennessee River were not handled by long-distance back-haul trucks but rather by empty-return trucking operations (*e.g.*, I.C.C. Tr. pp. 7010-11), and no significant evidence to the contrary.[10] This evidentiary picture was statistically confirmed by an exhibit graphically representing the charges for a representative number of truck shipments of grain from the Tennessee River to the Southeastern consuming areas, drawn from bills introduced by protestants themselves. The average truck charge shown by this exhibit was $3 per ton for a movement of 150 miles. This showing confirmed the judgment that had been made by Southern's Vice President, Robert S. Hamilton, in formulating the rates that "the possibility of a back-haul to pick up a low cost movement of exempt commodities does not reach a serious point until somewhere out to 300 or 350 miles," and that "figuring it on a round trip cost and a rather bare cost from 90 miles on out, the $2.40 minimum will be well under the cost of the truck operating with an empty return." (I.C.C. Tr. pp. 1998-99).

The record was thus clear that, contrary to the Commission's holding that the truck competition encountered by Southern at the Tennessee River and that encountered by it at the Ohio and Mississippi River demonstrated a "substantial similarity of transportation conditions," in fact the situation was quite the

[10] See also, *e.g.*, the statement in the brief to the Commission of appellant Cargill, Incorporated, dated November 5, 1962, at p. 101, that "almost exclusively the truck movement of the Tennessee River grain from the Tennessee River ports has been shown to be a movement with an empty return haul."

contrary.[11] In considering the validity of the Com-

[11] In implicit recognition that the Commission finding under discussion is in fact inconsistent with the evidence of record, both the Interstate Commerce Commission and the other appellants have in this Court virtually abandoned any effort to defend it in the terms in which it is written. Instead, they have sought to reinterpret the finding to make it mean that the Commission found that shippers at both the Tennessee and the Ohio and Mississippi Rivers are faced with the same "truck competition • • • of itinerant truckers who originate grain at points north and west of [the Ohio and Mississippi River crossings] and haul this grain through or around both these crossings and the Tennessee River ports."

This reading of the Commission's finding is not only entirely inconsistent with the testimony before the Commission of the barge lines serving the Tennessee River points that they had never felt the impact of any long back-haul truck competition (J.S. p. 116a), but is squarely contradicted by the very terms of the finding. The Commission's statement that "a carrier may not pick and choose the competition it will meet • • •" would have been wholly inapposite had the Commission been referring, as appellants now urge, to some sort of unitary competition from Midwest to Southeast, rather than to competition faced by appellees at the Tennessee River, on the one hand, and separate competition faced by them at the Ohio and Mississippi River on the other. Moreover, it will be noted that appellants' new interpretation of the finding requires the rewriting of the Commission's references to "competition at" particular points to read "competition through" and "around" those points. And finally, if the Commission had in fact been referring to long haul trucks loaded in the Midwest as constituting competition for shippers at the Tennessee and Ohio and Mississippi Rivers in the Southeastern grain markets, it would have been plainly immaterial whether those trucks moved "at," "through" or "around" the particular originating points served by Southern's rates. In short, appellants' argument is precisely the kind of "appellate counsel's *post hoc* rationalizations for agency action" that this Court has stated may not be used to justify an agency order. Burlington Truck Lines v. United States, 371 U.S. 156, 168.

Even as a post hoc rationalization, appellants' argument is without merit. The competition now claimed by appellants to have been found by the Commission is not transportation competition, the relevant Section 3(1) consideration (see Texas & Pacific R. Co. v. I.C.C., 162 U.S. 197, 234), but rather competition in the satisfying of consumer demand, unrelated to the method of transportation involved.

mission's determination that Section 3(1) required Southern to make rates on the same per-mile basis for short hauls from the Tennessee River as for long hauls from the Ohio and Mississippi Rivers, the court was thus faced with an affirmative Commission finding of substantial cost dissimilarities and a record requiring a conclusion that the substantial competitive similarities found by the Commission did not in fact exist. Under these circumstances the court was plainly correct in holding that the Commission's conclusions with respect to Section 3(1) were invalid and must be set aside.[12]

2. The Section 1(5) Issue.

As indicated above, the order of the Commission not only required a readjustment of Southern's proposed rates to make them "no less favorable" to shippers at the Tennessee River points, but also directed an across-the-board increase of the rates as thus adjusted by a minimum of 16 per cent. The expressed bases for the Commission's latter direction were its conclusions that the rates after the Section 3(1) readjustment could be expected to return to Southern 102 per cent of out-of-pocket costs, and that any rate structure which resulted in a return of under 118 per cent of out-of-pocket cost would be unreasonably low in violation of Section 1(5) of the statute and might constitute an un-

[12] The court had no occasion to, and did not, decide that transportation conditions between the longer and shorter hauls were in fact so dissimilar as affirmatively to justify the particular rate structure here involved. It rather held that the Commission's requirement of per mile equality was improper in light of its affirmative finding of a substantial dissimilarity in car utilization, and hence in cost, and in light of the absence of record support for its finding of substantial similarity of competitive conditions.

fair and destructive practice in violation of the National Transportation Policy. (J.S. pp. 40a, 49a).

When Southern originally formulated its rate proposal, actual experience with respect to the important cost factor of annual utilization was not available for Big John cars. Thus at the outset Southern relied on the best other available evidence to make the necessary informed judgment as to utilization under the rates. In doing so, Southern started from the fact that its utilization experience with *conventional* covered hopper cars showed a per car utilization of approximately annual 20,800 miles. (J.S. p. 135a). It was readily apparent that under the proposed rates Big John utilization would be very much higher for the following reasons, among others: a relatively long average haul; no delays for in transit processing; a free loading and unloading time substantially shorter than that applicable under conventional rates; movement in 5 car lots from one consignor to one consignee under a single bill of lading, with corresponding utilization efficiencies; and, of great significance, a substantially reduced rate level most attractive to shippers and certain to give Southern a substantially increased participation in a very large traffic movement. (J.S. pp. 136a-137a).

On the basis of all these considerations, it was the expert judgment of Southern's management that under the new rates Big John utilization would run in the neighborhood of 60,000 miles per year. In order to state its costs on a thoroughly conservative basis, Southern employed for this purpose a 40,000 car miles per year figure. (J.S. 137a).

As noted, at the outset it was necessary for Southern to make this judgment without the benefit of ac-

tual experience. Before the administrative record was closed, however, there had become available to Southern, and had been placed on the record, actual utilization figures showing that Southern's judgment had indeed been conservative. These figures were derived from the movement of Big John cars in hauling grain for the United States under Section 22 rates substantially similar to the rates here at issue, and also from the movement of those cars in carrying grain in single car shipments at substantially higher rates. The studies showed that under Section 22 rates the Big Johns moved at a rate of 60,000 car miles annually, and that even hauling grain at substantially higher rates and on a single car basis they moved at a rate of almost 40,000 car miles annually.[13]

Recognizing the significance of these factors, Division 2 found it appropriate to state Southern's costs on the basis of a 40,000 mile annual car utilization. On the basis of this figure, Division 2 found that the rates would return 118 per cent of Southern's out-of-pocket costs. (J.S. p. 109a).

The decision of the Commission not only flatly rejected the 40,000 mile utilization figure, but substituted for it the altogether irrelevant figure of approximately 20,800 miles that had been the experience with Southern's conventional covered hopper cars moving under altogether different rates and rules and, for the most part, handling shipments of commodities other than grain. The only reasons given by the Commission for its action were (1) that the Section 3(1) adjustment, by increasing the ratio of short to long hauls, would

[13] Some of the appellants claim that this evidence was "completely exploded" in the evidentiary hearing. (J.S. p. 17). Neither Division 2 nor the Commission so found.

diminish car utilization, and (2) that utilization would be additionally decreased by reason of the fact that under the Commission's decision other railroads as well as Southern would be permitted to publish rates on the same basis. (J.S. 48a-49a). The Commission's decision contains no explanation for its total disregard either of the many factors indicated above which showed that Big John utilization under the proposed rates would of a certainty be substantially higher than conventional covered hopper car utilization, or of the actual experience of Southern in the utilization of the Big John cars.

Since the Commission's conclusion that Section 1(5) required a 16 per cent increase in Southern's return level thus rested expressly on its utilization determination, and since that determination in turn was expressly predicated on the Commission's assumption that a readjustment of Southern's rate structure would take place in light of its Section 3(1) ruling, the Commission's Section 1(5) conclusion necessarily fell when its Section 3(1) ruling was reversed. The District Court was plainly correct in so ruling.[14]

Additionally, and even apart from erroneous reliance on the Section 3(1) ruling, the Commission's

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[14] The District Court also concluded that necessary subsidiary findings were lacking for the Commission's suggestion that the cost restatement used in the report of Division 2 "failed to give sufficient consideration" to the prior exclusion of certain items of maintenance expense. The validity of the court's conclusion is difficult to dispute since the Commission made no findings whatever in support of its suggestion. In any event, however, the validity of that conclusion is irrelevant to the correctness of the court's decision, since the adjustment implied by the Commission's suggestion would have only *de minimis* consequences, amounting to about 4/1000ths of a cent a ton mile, or considerably less than one per cent of the ton mile charge upon which the rates were constructed.

utilization conclusions were defective, as the court found, by reason of the Commission's failure sufficiently to justify them by adequate findings having support in the record. (J.S. 11a-12a). The Commission's facile suggestion that its use of a utilization figure of 20,800 miles was additionally justified because, under its decision, railroads other than Southern would also be publishing comparable rates ignored, without explanation, the fact that Southern's utilization figures were from the first predicated upon the conservative assumption that other railroads would be publishing such rates and that Southern would enjoy only 16 per cent of the total traffic. (I.C.C. Exs. 68, 503). In announcing its utilization figure, the Commission also simply ignored, and once again without any explanation, the vital differences between Big John car movement under the proposed rates and conventional covered hopper car movement under altogether different circumstances which on their face demanded a conclusion that utilization would be far higher in the former instance. This failure of the responsible agency to tender any rational support, by way of subsidiary findings, analysis of the evidence, or otherwise, for the utilization figure that was the basis for its Section 1(5) conclusions in itself—and quite apart from the fatal defect, discussed above, in those Section 1(5) conclusions by reason of their erroneous assumption of a Section 3(1) violation—precluded acceptance of those conclusions by the court below.[15]

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[15] The Commission's complete silence on the matters under discussion is particularly striking in light of the attention specifically directed to them in the dissenting opinion of Commissioner Freas:

> "It would appear that the majority's ultimate findings rest solely on its 20,852 car-mile utilization figure, a figure I believe is patently unsound. Can it really be believed that the involved equipment, requiring less maintenance, less switching, and no transit, and developed for long-haul

3. Section 15a(3).

Appellants attack at considerable length the additional ruling of the District Court that the Commission determination that a 16 per cent rate increase was necessary to avoid unfair and destructive competition in violation of the National Transportation Policy itself violated Section 15a(3) of the Interstate Commerce Act. The basis for appellants' attack is their assertion that the Commission did not in fact rely on the ground stated in directing the 16 per cent rate increase.

It is evident that if the decision of the District Court is otherwise correct, this attack of appellants is directed to an issue that is wholly academic. The predicate of the attack is the proposition that the Commission in fact directed an increase in Southern's rates solely in order to remedy a Section 1(5) violation. As we have shown above and as the District Court held, if appellants are correct in this assertion, the Commission's order requiring a rate increase must be set aside because it rests on assumptions as to car utilization which erroneously assumed a Section 3(1) violation and were otherwise defective. Accordingly, even if appel-

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through volume traffic solely on respondent's lines, would result in a figure the same as that applicable to conventional equipment utilized on and off 'owning lines? I think not. Indeed, the Southern's proposal here would lessen the persistent car supply problem plaguing the rail carriers, particularly the grain lines.' Respondent Southern's car utilization figures were based on actual experience, and were properly projected in special studies. It was demonstrated, and the division report so noted, that this equipment accrued greater mileage and hauled greater tonnage in the 2-year period since their acquisition than did conventional equipment in 10 or 15 years, or in 15 to 20 years, respectively. Actually, the division's 40,000 car-mile figure constituted a very conservative judgment, and there is some support for respondent's 60,000-mile figure." (J.S. pp. 55a-56a).

lants' argument on the point under discussion were to be accepted *in toto*, that fact would provide no basis for disturbing the decision of the court below.

It may be noted, however, that apart from its other deficiencies the Commission's conclusion that Southern's rates must be raised by a minimum of 16 per cent in fact does raise grave questions under Section 15a(3) in light of this Court's recent unanimous decision in *I.C.C.* v. *New York, N. H. & H. R. Co.*, 372 U.S. 744. The Commission expressly found that by reason of the fact that Southern's rates were published in good faith to meet the dominant competition of an unregulated mode of transportation (long distance back-haul truckers), the question of inherent advantage as between Southern and the barge line protestants was properly to be determined on the basis of out-of-pocket costs. (J.S. p. 32a). It further found that on this basis Southern's all-rail routes had a clear over-all cost advantage as against the barge-rail routes. (J.S. p. 34a). In light of these findings the Commission's conclusion that a rate structure returning to Southern 102 per cent of cost, and thus compensatory, would nevertheless be unreasonably low because of its potential effects on the barge lines appears to fly directly in the face of the policy of Section 15a(3), emphasized in the *New Haven* case (372 U.S. at p. 757):

> "to permit the railroads to respond to competition by asserting whatever inherent advantages of cost and service they possessed."[16]

[16] In this connection it is altogether irrelevant whether the Commission sought to justify its requirement of an increase by reference to the National Transportation Policy or to Section 1(5), since in either event the question would be whether the policy of Section 15a(3) is thwarted by requiring a carrier to increase an already compensatory rate for the purpose of holding an umbrella over other forms of transportation.

The problem under Section 15a(3) is particularly acute where, as here, the Commission requires a very substantial increase over an already compensatory rate to a specific level (here 118 per cent of cost) without more than the most perfunctory and inadequate attempt to justify that level. The Commission gave only three reasons for selecting the 118 per cent figure. (J.S. p. 49a). The first of these, that it had been the figure shown by Division 2's costs calculations, merely reposes the question and does not begin to answer it. The second, that the Southern itself would regard a return of 102 per cent as inadequately compensatory, is simply incorrect. And the third, that even at that over-all level the rates would not recover out-of-pocket costs on some point-to-point movements, supports not the conclusion reached but if anything a conclusion that certain point-to-point adjustments might be required. The glaring deficiencies in these subsidiary findings would fully justify a ruling that the Commission here acted in violation of Section 15a (3), if, contrary to fact, such a ruling was necessary to a determination of this case. They are additionally significant in showing the essential arbitrariness of the Commission's action under Section 1(5) in holding insufficiently compensatory any rate below a level which, so far as the Commission's findings show, was selected on no more solid basis than caprice.

4. The District Court's Disposition of the Case.

The final argument of the appellants, that the action of the court in enjoining the Commission's order rather than remanding the case to the Commission for further proceedings consistent with its opinion exceeded the court's authority, is wholly without merit. The court has not affirmatively validated the rates here at issue, but rather has only held that on the record

before it the Commission's reasons for requiring particular adjustments in the rates were insufficient. The court's judgment enjoining the Commission's order does not insulate the rates from such further action as the Commission may see fit to take in the premises. Where, as here, an order of the Commission is set aside by a court by reason of deficiencies in findings or evidence, the Commission may, irrespective of whether the matter is remanded for further proceedings, take any further action with reference to the subject matter of its order that it may deem appropriate, including a reopening of the proceeding for the taking of additional evidence and the rendering of new findings. See, *e.g., Florida* v. *United States*, 282 U.S. 194, 215; *Erie R. Co.* v. *United States*, 64 F. Supp. 162 (S.D. Ohio 1945).[17]

[17] This fact disposes of the argument made by the appellants other than the Commission (J.S. p. 21) that serious questions exist as to the legality of the rates published by the other carrier appellees for transportation in conventional covered hopper cars. Nothing in the District Court's disposition of the case precludes the Commission from taking such action as to these rates as it might deem appropriate.

CONCLUSION

For the foregoing reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

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